2000

Defamation havens

Brian Martin
University of Wollongong, bmartin@uow.edu.au

Defamation havens

Abstract

Defamation law is frequently used to suppress free speech. The Internet provides a means to challenge this. A country without laws against defamation could become a "defamation haven" by providing Web sites and publication assistance. A more immediate alternative is reproducing material on multiple Web sites, thus creating a "virtual defamation haven." Struggles over defamation on the Internet illustrate the way media forms are influencing free speech battles.

Disciplines

Arts and Humanities | Law

Publication Details

Martin, B. (2000). Defamation havens. First Monday, 5 (3).

First Monday, Volume 5, Number 3 - 6 March 2000

PEER-REVIEWED JOURNAL ON THE INTERNET

Defamation Havens

by Brian Martin

Defamation law is frequently used to suppress free speech. The Internet provides a means to challenge this. A country without laws against defamation could become a "defamation haven" by providing Web sites and publication assistance. A more immediate alternative is reproducing material on multiple Web sites, thus creating a "virtual defamation haven." Struggles over defamation on the Internet illustrate the way media forms are influencing free speech battles.

Contents

Introduction

The Net could make defamation law obsolete. The best solution to defamatory comments is a timely opportunity to reply, and this is readily available to users through e-mail lists and the Web. This is a dramatic difference from the mass media, where the ordinary person usually can't afford to reply to a defamatory story.

Defamation law is supposed to balance the private right to protect one's reputation with the public right to freedom of speech. The law allows people and organisations to sue those who say or publish false and malicious comments. Anything that brings a person into contempt, disrepute or ridicule, or otherwise injures the person's reputation, is likely to be defamatory.

Traditionally, there are two types of defamation. Slander is oral defamation, such as from stories told at a meeting or comments in a telephone conversation. Libel is published defamation, such as a newspaper article or television broadcast. Pictures as well as words can be libellous. Defamation on the Web or e-mail is a type of libel.

Defamation law is an extremely slow, expensive and unreliable way to address injuries to reputation. Cases often take years to progress through the legal process and, if they run in court, can cost hundreds of thousands of dollars. Decisions are often dependent on esoteric legal points rather than the substance of what happened. Finally, the normal remedy for successful litigants, a payment to the defamed party, does not in itself redress the injury to reputation. The reality is that defamatory comments occur all the time but the law is seldom an effective means to obtain redress.

Many people who are defamed would like most of all to be able to reply promptly to the same audience that was exposed to the defamatory comments. However, the mass media are notoriously reluctant to publish retractions and frequently fight a case through the courts at great expense rather than provide a prompt opportunity to reply. By comparison, the Net provides a wonderful solution to Net defamation, namely a low cost and timely avenue for replying to the same audience.

If damaging material is posted on the Web or circulated on an e-mail list, one response is to request the author to post a reply and to send a reply to the e-mail list. That is straightforward and happens routinely. If the author refuses to post a reply or to remove the offending material, information about this can be circulated to potentially interested parties on the Net with rapidity, low cost, convenience and precision that is impossible to match with mass media, much less the courts.

Not only is defamation law ineffective for dealing with defamation, but it has a darker side. It is routinely used to suppress free speech, especially speech critical of those with power and wealth [1].

In countries such as Australia and Britain, defamation laws are incredibly harsh and used capriciously [2]. One Australian book reviewer, for example, said in a newspaper "I object to the author's lack of moral concern." The author sued and after two trials finally obtained more than $100,000 from the publisher [3]. In another case, police in Western Australia kept a book off the market for a decade by

launching dozens of defamation actions against the author, publisher and retailers [4]. Corrupt politicians have escaped media scrutiny by threatening actions for defamation [5].

Things look better on paper in the United States, but in practice defamation law often restrains free speech [6]. After the magazine *Rolling Stone* published an article about the origin of AIDS from polio vaccines, the scientist who developed the vaccine in question sued. *Rolling Stone,* having spent half a million dollars on legal fees before even getting to court, decided to settle by publishing a "clarification". It didn't run any further stories on the topic [7].

There are hundreds of cases where U.S. defamation law has been used to intimidate citizens who write letters of complaint to the government or even just sign a petition. Uses of defamation and other laws to squelch free speech have been dubbed SLAPPs (Strategic Lawsuits Against Public Participation). They show how the legal system can be manipulated by powerful and wealthy groups [8].

The Net cannot solve all these problems at a stroke, but it does offer the potential to get around one major obstacle: how to publish material when the mass media are scared away by the threat of defamation. The answer: put it on the Web or an e-mail list.

How to publish material when the mass media are scared away by the threat of defamation? The answer: put it on the Web.

One of the most common ways that defamation law is used to suppress free speech is through threats, which are far more common than actual lawsuits. Even cases lodged in court seldom come to trial, with many dropped along the way. But publishers are understandably reluctant to take the risk of a costly court case and hence in many instances a threat leads to blocking of publication. Even more insidious than threats is the fear of being sued, leading to a form of self-censorship. Some editors and publishers avoid anything controversial for fear of offending potential litigants. The Net sidesteps these problems by allowing self-publication. The author just sets up a Web site or sends e-mails to recipients.

Of course, the author can still be sued. But this may not be as big a risk as might be imagined. Mass media corporations are more attractive targets because they have a lot more money. It is expensive to follow a defamation case through to the end and the process would be financially unattractive if the author has few assets.

For example, if the author's only major asset is a house, perhaps with a heavy mortgage, then a threat to sue is likely to be a bluff. The best strategy for the author is to refuse to acquiesce and wait for the threatener to give up. To parry the initial legal moves, free or low cost access to a sympathetic libel lawyer is a great advantage.

If threats to the author do not succeed, a next step is to threaten to sue the Internet service provider (ISP) hosting the Web site or forwarding e-mails in question. Depending on the particulars, some ISPs will acquiesce to threats, some will resist and a few may eventually be sued.

The author can keep one step ahead but putting the material on the Web in another country. However, even this isn't totally safe, since the ISP can be sued in another country, and the author can be sued there or at home. One solution to this problem is defamation havens.

A country could make itself a defamation haven by eliminating all laws against defamation and offering itself as a host for Web sites or targeted e-mail. Local writers could offer, for a fee, to be the authors of documents. Alternatively, indigent writers from other countries could be the authors. A defamation haven would be analogous to a tax haven, though less lucrative.

A country could make itself a defamation haven by eliminating all laws against defamation and offering itself as a host for Web sites or targeted e-mail.

So far, there are no countries that have advertised themselves as defamation havens. However, there is an alternative that can be just as effective: getting a number of people around the world to put the material on their Web sites in the cause of free speech. In principle, each ISP and Web host could be sued. But this is pretty unlikely, given the costs of mounting cases in foreign jurisdictions. Furthermore, defamation laws vary from country to country, and sometimes between provinces within countries, so the attempt to shut down all the sites internationally may have little prospect of success compared to achieving this in single jurisdiction with harsh legislation.

One consequence of the process of obtaining numerous Web hosts for the material is that more people are exposed to the issue. Attempts at censorship often lead to greater attention to the material in question, and attempts at shutting down Web sites are no different. Even if Web hosts and ISPs acquiesce to threats, others can be sought who will be willing to host the material, leading to ever more attention to it.

This account of how to use the Net to overcome the suppression of speech by defamation law has been abstract. To illustrate the dynamics in practice, two case studies are presented here, in both of which I was involved personally. I choose these cases because I am familiar with the details and can be more confident about the interpretation, something that is especially important when defamation is involved. Others undoubtedly can provide their own examples.

The focus here is on Net-based strategies against suppression of speech by defamation law. The important related issue of defamation actions against Net publication is not addressed.

The University of Adelaide Versus Dudley Pinnock

Dudley Pinnock was Professor of Entomology at the University of Adelaide, where he worked for nearly 20 years. He was highly successful, obtaining outstanding teaching evaluations and bringing in large amounts of outside research money. However, in late 1996 he was targeted for involuntary redundancy. He appealed against the decision through an internal review committee and was supported in this by the National Tertiary Education Union, but lost the appeal and, hence, his job [9].

Pinnock gave me a copy of a document about his case. After he lost his appeal, he authorised me to put it on my Web site at the University of Wollongong, where I have numerous documents about suppression of dissent and related matters (see http://www.uow.edu.au/arts/sts/bmartin/dissent/).

Geoff Maslen, a journalist who writes regularly for the Australian weekly newspaper *Campus Review,* prepared a story on the Pinnock case and, in contacting officials at the University of Adelaide, made them aware of the Pinnock document on my Web site. The Vice-Chancellor of the University of Adelaide, Mary O'Kane, wrote a letter to the Vice-Chancellor of the University of Wollongong, Gerard Sutton, about the Pinnock document on my site. I was not allowed to see this letter, but was told that it said that the document looked like it was published by the University of Wollongong, that it was defamatory of the University of Adelaide, that it contained untrue statements and that continued publication might result in legal action [10]. I received a letter from the Vice-Principal at the University of Wollongong requesting me to remove the document because the University did not wish to be exposed to possible legal action [11].

If officials at the University of Adelaide had approached me directly with information about the Pinnock case, for example to argue that some statements in the documents were false or requesting that I post a reply, that would have been a process of dialogue and debate. However, their approach was to try to stop publication. It is a classic characteristic of attempts to suppress speech for a complaint to be made to a person's superior rather than directly to the person concerned.

It is a classic characteristic of attempts to suppress speech for a complaint to be made to a person's superior rather than directly to the person concerned.

I removed the Pinnock file from my site, replacing it with an account of what had transpired, adding material as time went on. I wrote a letter to the Vice-Chancellor of the University of Adelaide, asking her to send me details of particular statements and imputations in the document that she considered to be "false, misleading and defamatory" and offering to post a reply on my site. I put this letter on my site. She replied two months later but gave no details of any false, misleading or defamatory statements.

I contacted Danny Yee, a leading figure in Electronic Frontiers Australia, about finding sites for the Pinnock document. He put the document on his site at the University of Sydney and through his contacts three others put the document on their sites. I put links to these.

Meanwhile, Geoff Maslen's stories about the Pinnock case and the struggles over my Web site appeared in *Campus Review* [12]. I put these articles on my site. Because newspapers have much to lose from defamation suits, they routinely have lawyers check stories to make sure they can be adequately defended in court. So it seemed safe to put the *Campus Review* stories on my site. I am not aware of any subsequent defamation action against *Campus Review.*

The defamation threats from the University of Adelaide ended up giving more attention to the Pinnock story than would have occurred otherwise. That result should be the goal for those who oppose censorship through defamation.

The University of Adelaide's attempts to block publication of the Pinnock document could have been resisted at any of a number of stages. First, the University of Wollongong administrators could have ignored the defamation threat. This would have been a safe option, given that it would be terribly bad publicity for the University of Adelaide to prosecute a case for defamation against another university, using taxpayer money to attempt to suppress free speech. By resisting the threat, the University of Wollongong could have developed a reputation as a defender of free speech.

Second, I could have refused to remove the Pinnock document from my site after being requested to by the University of Wollongong administration. The document might have been allowed to remain or, alternatively, penalties might have been applied to me, such as removing my entire site or my net access. This could have been an opportunity for me to highlight the issue and become the centre of attention in a free speech struggle. However, I decided to enroll others in the struggle rather than try to hold the line as an individual.

Third, the several sites hosting the Pinnock document served as a virtual defamation haven. If any of them came under threat, the hosts could either resist or acquiesce (by removing the file). In the latter case, more sites could be sought, maintaining the virtual haven.

This is exactly what happened at the end of 1999, after the Pinnock document had been freely accessible for more than two years. I have been informed that the Vice-Chancellor of the University of Adelaide contacted at least two of the three remaining Web hosts of the Pinnock document, threatening a defamation action unless the document was removed and that, as a consequence, the document is no longer available at the University of Sydney site. Hence I sought an additional site for the file overseas, maintaining the virtual defamation haven.

The University of Western Australia versus David Rindos

David Rindos, an archaeologist from the U.S., took a post at the University of Western Australia (UWA) in 1989. He soon became aware of some unsavoury activities in his department and reported them. Subsequently, he came under fierce attack and was denied tenure. His case generated enormous concern internationally and led to the establishment of a Web site of documents about the case (see http://www.acsu.buffalo.edu/~hjarvis/rindos.html), especially copies of letters, submissions and newspaper articles, maintained by Hugh Jarvis at the State University of New York (SUNY) at Buffalo.

The site was located in the U.S. to better resist pressure from UWA to shut it down. UWA contacted SUNY threatening to sue for defamation but did not initiate a suit. SUNY refused, on free speech grounds, to close the site. Later, the site at SUNY was mirrored at other locations. This provided a virtual defamation haven for the Rindos documents [13].

This case is of special interest because UWA pursued an additional strategy. It tried to stop publication of the Web site address.

I had followed the Rindos-UWA case for some years and written a few letters about it. In May 1996 two similar letters of mine appeared, one in the *Australian* (8 May 1996, p. 41), a national daily newspaper with a higher education supplement each Wednesday, and the other in *Campus Review* (8-14 May 1996, p. 8). Here is the text of my letter published in *Campus Review* under the title "Threat to autonomy."

> "THE West Australian parliament has set up an inquiry into the events surrounding the denial of tenure to Dr. David Rindos by the University of WA.
>
> It has been reported that the Australian Vice-Chancellors' Committee sees this inquiry to be a threat to autonomy.
>
> But sometimes "university autonomy" can be at the expense of other interests. In the numerous cases of whistleblowing and suppression of dissent that I have studied, internal procedures seldom have delivered justice. Universities are little different from other organisations in this regard.

> When an academic exposes some problem such as favouritism, plagiarism or sexual abuse, it is common for senior academics and administrators to close ranks and squelch open discussion. A more enlightened response would be for the university to put its house in order. If the University of WA had set up a truly independent inquiry, with experts from the outside, the present parliamentary inquiry probably would have been unnecessary.
>
> The Senate Select Committee on Unresolved Whistleblower Cases reported in October last year. In relation to higher education, it commented as follows: "The committee heard allegations of destruction of documents, alteration of documents, fabricated complaints concerning work performance and harassment of the individuals concerned. Such allegations raise concerns about the ethical standards within institutions and attitudes to outside review. The committee concedes that there is a need for outside review to be balanced against the autonomy of academic institutions. However, autonomy cannot be allowed to override responsibility to academic staff as well as students."
>
> Since a web page has been set up about the Rindos case (http://www.acsu.buffalo.edu/~hjarvis/rindos.html), readers can judge the issue for themselves without relying on the AVCC."

On 15 May, I received a letter from the legal firm acting for UWA. The letter stated that the material on the Web site "contains statements which are defamatory of members of our client's [UWA] academic and administrative staff, including the Vice-Chancellor and at least one Professor. By publishing the address of the Web site, you have both drawn the attention of others to it and have provided the means by which the defamatory material posted on the site may be viewed. That constitutes a re-publication of the defamation." They stated further that unless I refrained from publishing anything containing the Web site address, UWA "will be forced to consider recommending to its staff members that action be taken against you." I understand that similar letters were sent to the *Australian, Campus Review* and the Australian Broadcasting Corporation, which had made a broadcast mentioning the site.

If it is defamatory to refer people to a site that contains allegedly defamatory material, then by the same logic all sorts of everyday recommendations could be considered defamatory. A large Web site can have as many words as a book, a newspaper, or major collection of documents. By analogy, the following actions could be considered defamatory:

- recommending that someone reads a book, newspaper or magazine;
- referring someone to a section of a library;
- suggesting that someone reads the graffiti along a train line;
- telling someone to read documents in the drawer of a filing cabinet;
- citing a source as a footnote in a scholarly article.

Note also that UWA only *alleged* that the Rindos Web site contained defamatory material. UWA's case would have been more persuasive if specific material on the site had been proved in court to be defamatory.

I continued to list and make a link to the Rindos Web site address on my own site and was not sued by anyone, suggesting that the UWA threat to me was a bluff. From the point of view of opposing threats to free speech, the key question was whether the UWA threat would deter the mass media from further publicising the Web site address. According to ABC journalist Jane Figgis, after she broadcast a programme giving the Web site address, UWA contacted the ABC, which removed the reference from the repeat broadcast. I sent letters to the *Australian* and *Campus Review* telling about the UWA threat. The *Australian* did not publish the letter. *Campus Review* took a stronger line. The editor, Warren Osmond, published my letter (though omitting the Web site address) and refused to agree to UWA's demand [14].

A defamation action for simply publishing a Web address, along with the allegation that the Web site contained defamatory material, would seem to have little chance of success in court, though one never knows in Australia.

A defamation action for simply publishing a Web address, along with the allegation that the Web site contained defamatory material, would seem to have little chance of success in court, though one never knows in Australia. Nevertheless, UWA's threat apparently inhibited mass media outlets from further publication of the address.

If publication of a Web site address, or making a hyperlink, were considered defamatory, the next stage

of the struggle would be to tell people that a Web site about the Rindos case exists, since it can be readily found using search engines. Could stating that a Rindos Web site exists conceivably be considered defamatory?

To further challenge UWA's attempted censorship, I composed a general message about what had happened, including the text of my first *Campus Review* letter, and sent it by e-mail to staff at the University of Wollongong and to various others whom I thought would be interested. In my message I encouraged individuals to send copies to others: "If you are concerned about this attempt by UWA officials to inhibit open discussion, you can send a copy of this message to others who might be interested."

As a result of this initiative, I received quite a few supportive messages. Several individuals set up links from their own Web sites to the Rindos Web site and wrote letters informing the Vice-Chancellor of UWA of this. Others informed me that they forwarded my message to numerous other people. Thus, by alerting people to UWA's defamation threat, information about the Rindos Web site was circulated more widely. As well, journalists in Perth wrote stories about UWA's actions [15].

Conclusion

Defamation law not only is an unwieldy method for dealing with defamation but is frequently used to suppress free speech. The Net provides an effective means of responding to Net defamation and for publishing material that the mass media are afraid to touch. This is not to say that the Net is an ideal system for protecting reputations and affording free speech, just that it is greatly superior to the combination of mass media and defamation law [16].

A country could set itself up as a defamation haven by having no law against defamation and hosting Web sites. Even without this option it is possible to create virtual defamation havens by putting material on multiple Web sites.

However, those who wish to stop others' speech will seek new avenues for censorship. They can threaten Web site hosts with legal action; this can be countered by refusing to acquiesce or by finding new hosts.

Attempts to muzzle publication on the Net can readily backfire, by triggering free speech concerns and leading to mirror sites and e-mail list alerts. Therefore, the battle lines may be drawn at the interface between the Net and the mass media, as illustrated by the University of Western Australia administration's attempt to block publication of a Web site address. The more people who can receive information via the Net, the less effective such strategies will be.

The Net provides such ease of publication that the key in the future may not be access but rather credibility. With mounds of defamatory material, of claims and counterclaims, will anyone pay attention? Being an impeccable source would be extremely important. In a world with easy publication and no generally effective defamation law, there will still be a great incentive to be accurate if one wants to be taken seriously. That may be better protection for reputations than defamation law ever provided [17].

About the Author

Brian Martin is associate professor in Science, Technology and Society at the University of Wollongong, Australia. His research interests include nonviolence, dissent, democracy and scientific controversy. His most recent books are *Suppression Stories* (1997), *Information Liberation* (1998), *The Whistleblower's Handbook* (1999) and (with Lyn Carson) *Random Selection in Politics* (1999). He is past president of Whistleblowers Australia and maintains a Web site on suppression of dissent.
E-mail: brian_martin@uow.edu.au
http://www.uow.edu.au/arts/sts/bmartin/

Notes

1. On whistleblowing and suppression of dissent more generally, see for example William De Maria, *Deadly Disclosures* (Adelaide: Wakefield Press, 1999); David W. Ewing, *Freedom Inside the Organization: Bringing Civil Liberties to the Workplace* (New York: Dutton, 1977); Myron Peretz Glazer and Penina Migdal Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* (New York: Basic Books, 1989); Geoffrey Hunt (editor), *Whistleblowing in the Social Services: Public Accountability and Professional Practice* (London: Arnold, 1998); Nicholas Lampert, *Whistleblowing in the Soviet Union: Complaints and Abuses under State Socialism* (London: Macmillan, 1985); Marcia P. Miceli and Janet P. Near, *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees* (New York: Lexington Books, 1992); Gerald Vinten (editor), *Whistleblowing - Subversion or Corporate Citizenship?* (London: Paul Chapman, 1994); Deena Weinstein, *Bureaucratic Opposition: Challenging Abuses at the Workplace* (New York: Pergamon, 1979); Alan F. Westin, with Henry I. Kurtz and Albert Robbins (editors), *Whistle Blowing! Loyalty and Dissent in the Corporation*

(New York: McGraw-Hill, 1981).

2. Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson, *Libel and the Media: The Chilling Effect* (Oxford: Oxford University Press, 1997); Robert Pullan, *Guilty Secrets: Free Speech and Defamation in Australia* (Sydney: Pascal Press, 1994).

3. David Bowman, "The story of a review and its $180,000 consequence," *Australian Society,* volume 2, number 6 (1 July 1983), pp. 28-30.

4. Avon Lovell, *The Mickelberg Stitch* (Perth: Creative Research, 1985); Avon Lovell, *Split Image: International Mystery of the Mickelberg Affair* (Perth: Creative Research, 1990).

5. Sir Robert Askin, premier of the Australian state of New South Wales for the decade 1965-1975, was widely thought to receive large bribes, but nothing was said in the mass media until just he died, after which he could not sue for defamation. For the first posthumous exposé, see David Hickie, "Askin: friend to organised crime," *National Times,* 13-19 September 1981, pp. 1, 8. Note that in some jurisdictions, relatives can sue for defamation after the death of the defamed person.

6. For a comparison of countries, see Michael Newcity, "The sociology of defamation in Australia and the United States," *Texas International Law Journal,* volume 26, number 1 (Winter 1991), pp. 1-69.

7. Michael K. Curtis, "Monkey trials: science, defamation, and the suppression of dissent," *William & Mary Bill of Rights Journal,* volume 4, number 2 (1995), pp. 507-593.

8. George W. Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Philadelphia: Temple University Press, 1996).

9. After leaving the University of Adelaide, Pinnock entered private enterprise and has been doing very well for himself. He has not been directly involved in struggles over the document about his case at the University.

10. David Rome, Vice-Principal (Administration), University of Wollongong, phone conversion, 26 August 1997.

11. David Rome, Vice-Principal (Administration), University of Wollongong, letter to Brian Martin, 20 August 1997.

12. Geoff Maslen, "Unis clash over redundancy protest on Web", *Campus Review,* volume 7, number 33 (27 August - 2 September 1997), p. 1; Geoff Maslen, "When redundancy strikes ...", p. 11.

13. Ironically, given the value of Net publication for Rindos' struggles, Rindos himself used defamation law to sue an anthropologist who defamed him on a computer bulletin board, winning A$40,000 which, however, was never paid. This was one of the world's first successful legal actions for defamation on the Net.

14. Brian Martin, letter, *Campus Review,* volume 6, number 21 (5-11 June 1996), p. 8.

15. Joe Poprzeczny, "UWA in web site attack," *Sunday Times* (Perth), 12 May 1996; Joe Poprzeczny, "Rindos affair hits the net," *Sunday Times* (Perth), 19 May 1996; Peter Morris, "UWA Rindos case writ threats spark storm," *West Australian,* 7 June 1996.

16. An issue not addressed here is power inequalities on the Net in relation to defamation. For example, if a large ISP defames an individual, there might not be an equivalent opportunity to reply. Some on-line discussion groups are closed, again restricting opportunities for response.

17. I thank Judith Gibson, Hugh Jarvis and Danny Yee for helpful comments on a draft.

Editorial history

Paper received 22 February 2000; accepted 25 February 2000.

Contents Index

Defamation Havens by Brian Martin
First Monday, volume 5, number 3 (March 2000),
URL: http://firstmonday.org/issues/issue5_3/martin/index.html